United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

332

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

NO. 22,810

HORACE CASE,

Appellant

V.

ARTHUR E. MORRISETTE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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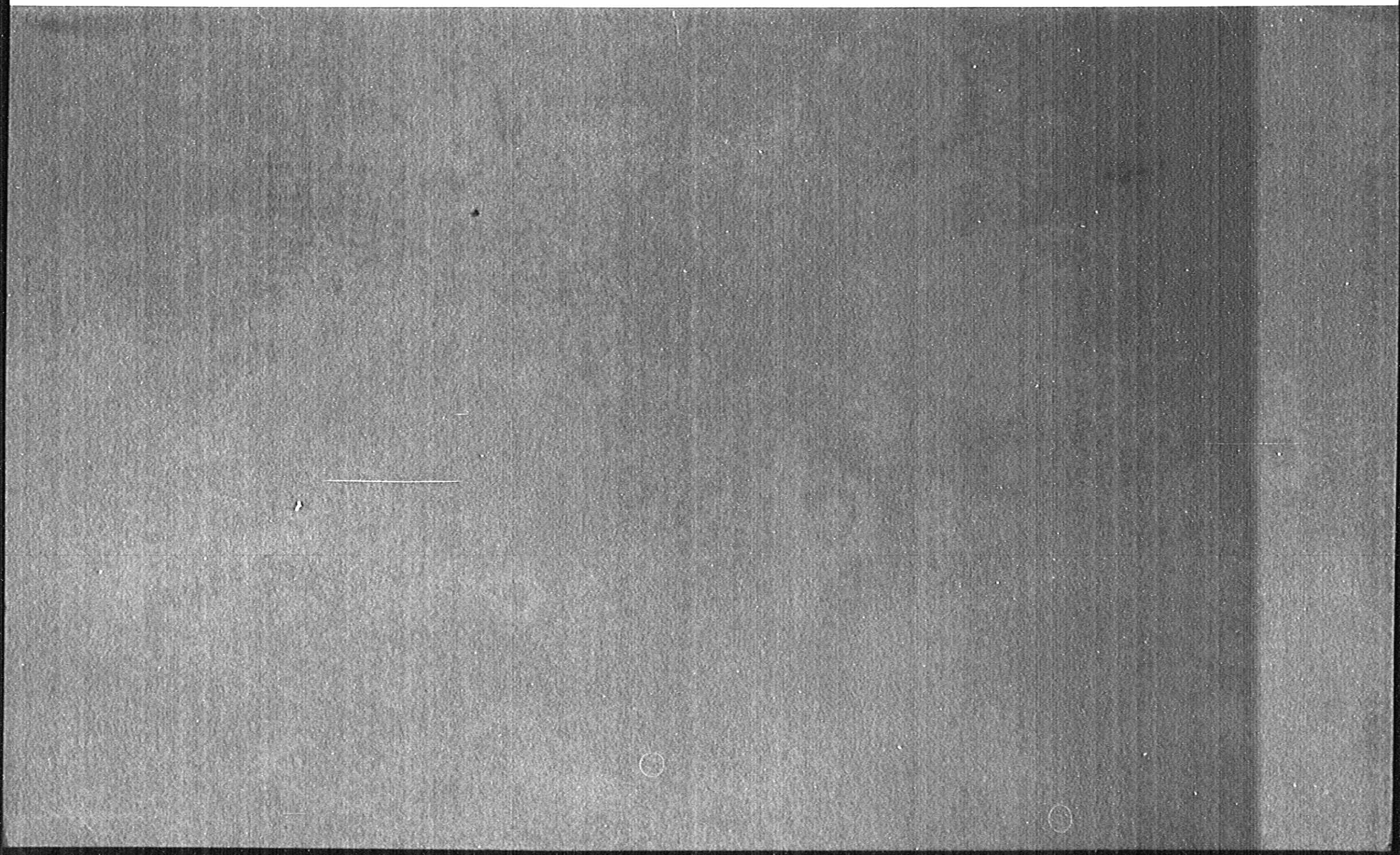

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ISSUE PRESENTED

In the opinion of the Appellant, the question presented by this case is:

Whether land claimed by the Appellee, known as lot 43, square 5869 in Dexter Heights subdivision, Washington, D.C., was dedicated for subdivision parking by the builder of the subdivision for the benefit of the Appellant and other residents of Dexter Heights, thus estopping said builder from vacating the dedication by attempting to convey it to the Appellee, a purchaser with actual and constructive notice of the dedication.

This case has not previously been before this Court under any other name or title.

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TABLE OF CASES

Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

For The District Of Columbia

NO. 22,810

HORACE CASE, Appellant

V.

ARTHUR E. MORRISETTE, Appellee

Appeal From the United States District Court
For the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, section 1291 of the United States Code (1964 Ed.) to review the action of the District Court in this proceedings. The Court below denied the relief prayed in the Complaint, instituting the action, and entered a final order from which this appeal is taken.

STATEMENT OF THE CASE

The Appellant ownes property in the District of Columbia, known as lot 1066, square 5869, which is improved by premises located at 1349 Talbert Terrace, S.E., Washington, D.C. Appellee claims title to a vacant piece of property, known as lot 43, square 5869. Both properties are located in a subdivision called Dexter Heights which was built by the Dexter Realty Company in 1942. The Appellant instituted an action in the United States District Court for the District of Columbia seeking a declaratory judgment that the land claimed by the Appellee had been dedicated by the Dexter Realty Company for subdivision parking, and seeking an injunction restraining the Appellee from using the land in any manner inconsistent with the dedication. After a trial on December 2, 1968, the District Court entered a judgment denying relief to the Appellant. It is from the judgment that the Appellant appeals.

FACTS

The Dexter Realty Company built a subdivision of row houses, called Dexter Heights, located in southeast Washington, D.C. in 1942. (J.A. 16, 23) The houses in the Dexter Heights subdivision were built under FHA regulations and were originally built to be rented to people in Washington, D.C., engaged in defense work during World War II. (J.A. 23) The Dexter Realty Company filed a Declaration creating the Dexter Heights

subdivision in the land records of the District of Columbia on August 17, 1942. (Plaintiff's Exhibit No. 1.) A site plan showing the size, shape, dimensions, and lay out of all the lots in the Dexter Heights subdivision was attached to the Declaration and incorporated by reference in it. (Plaintiff's Exhibit No. 1.

The District of Columbia Zoning Commission passed a regulation on June 6, 1942, to be effective September 8, 1942, requiring off street parking for all new residential construction. (Plaintiff's Exhibit No. 3.)

A lot, described as lot 43, square 5869, was shown on the site plan as a lot "To be graded and cinder covered for car parking (50 cars) provide proper driveway entrance from Talbert Terrace." (J.A. 14, 16)

The Dexter Realty Company was required to provide off street parking for the residents of Dexter Heights by Federal Housing Regulations. (J.A. 25, 29.)

The Dexter Realty Company commissioned Mr. Ernest W. Syme, a registered architect, to draw site plans for the Dexter Heights subdivision. (J.A. 15, 16) The site plan, attached to Plaintiff's No. 1, was a copy of the original site plan prepared by Mr. Syme. (J.A. 16) Mr. Syme testified that the description of lot 43, square 5869 on the plat map indicated that it was to be used as off street parking for the residents of Dexter Heights. (J.A. 16) Mr. Warren Gray, a duly qualified and registered architect,

testified that the site plan, attached to Plaintiff's Exhibit No. 1, showed that lot 43, square 5869 was to be used as a parking area for the residents of the Dexter Heights subdivision. (J.A. 14, 15) Mr. Robert G. Weightman, a real estate broker, who had been treasurer of the Dexter Realty Company during the time the Dexter Realty subdividion was under construction, testified that lot 43, square 5869 was required to be used as off street parking for the residents of the Dexter Heights subdivision by federal regulations. (J.A. 25, 29)

Dexter Realty Company built houses in Dexter Heights and rented them to people engaged in defense work during World War II. (J.A. 23) However, Dexter Realty Company failed to grade and cinder cover lot 43 for off street parking for the residents of Dexter Heights even though it was required to do so by government regulations. (J.A. 25, 29) At a later date Dexter Realty Company sold all the houses in Dexter Heights to individual G.I. purchasers. (J.A. 26)

The Appellant bought a house in Dexter Heights, lot 1066, square 5869, on June 28, 1949. (Plaintiff's Exhibit No. 3,) Appellant's deed incorporated by reference the Declaration and site plan filed by the Dexter Realty Company on August 17, 1942. (Plaintiff's Exhibit No. 1 & 2) (Plaintiff's Exhibit No. 3,) The Appellant and his neighbors presently park their cars on the street. (J.A. 21) The parking conditions in the Appellant's neighborhood are congested and inadequate because there are no facilities for off street parking. (J.A. 19, 20, 21) Both of the streets in the Dexter Heights subdivision are narrow and congested with cars parked by the residents. (J.A. 20, 21) The Appellant first received knowledge

that he and his neighbors might be entitled to parking rights on lot 43, square 5869 during the spring of 1968 when he consulted an attorney, who made a title search. (J.A. 19)

Appellee, Morrisette, purchased lot 43, square 5869 from the successor of the Dexter Realty Company around July 26, 1963. (Plaintiff's Exhibit No. 4) The Appellee's deed expressly referred to lot 43, square 5869 as the lot designated for car parking. (Plaintiff's Exhibit No. 4) The Appellee had knowledge at the time he acquired lot 43, square 5869 that it was designated on the site plan, attached to the Declaration, (Plaintiff's Exhibit No. 1 & 2) as the lot to be used for off street parking for the Dexter Heights subdivision. (J.A. 17)

The Appellee intends presently to remove lot 43, square 5869 from the Dexter Realty subdivision and include it in a proposed, adjoining development that would be erected on several lots that he had assembled. (Tr. 57, 58) The proposed development, called Talbert Overlook Development (Tr. 52, 54, 56, 63) would consist of four buildings containing 110 apartment units. The Appellee intends to use lot 43, square 5869 as part of the required off street parking for the proposed Talbert Overlook Development. (J.A. 17) The Appellee planned to place approximately 40 parking spaces on lot 43, square 5869 for the exclusive use of residents of the proposed Talbert Overlook Development. (Tr. 53) The Appellee does not intend that residents of the Dexter Heights subdivision park on lot 43, square 5869. (Tr. 55)

STATEMENT OF POINTS

1. The land claimed by the Appellee, known as lot 43, square 5869, was dedicated for subdivision parking by the builder of the subdivision for the benefit of the builder and other residents of the Dexter Heights. Thus the builder was estopped from attempting to vacate the dedication by conveying it to the Appellee, a purchaser with actual and constructive notice of the dedication.

SUMMARY OF ARGUMENT

POINT I

When Dexter Realty Company sold lots in Dexter Heights with a subdivision site plan as part of the claim of title of all lots in the subdivision, a common law dedication was made of all lands indicated for public use on the site plan, including the area designated for subdivision parking. Every purchaser of lots in Dexter Heights acquired as a right appurtenant to his lot, every easement, privilige and advantage, including the right of off street parking, that Dexter Heights Realty Company represented to be part of the subdivision on the site plan.

Dexter Realty Company's objective acts created a dedication of lot 43 for subdivision parking, in spite of the fact that its secret intent for designating an area for off street parking may have been to mislead Federal Housing Officials into believing that it intended to provide of street parking, while it had no actual intent to do so. Having made a common law dedication, Dexter Realty Company was estopped from attempting to vacate the dedication by conveying the land

to the Appellee, a purchaser with actual and constructive notice of the dedication.

ARGUMENT

POINT I

THE LAND CLAIMED BY THE APPELLEE WAS DEDICATED FOR SUBDIVISION PARKING BY THE SUBDIVISION BUILDER, AND THE BUILDER WAS ESTOPPED FROM ATTEMPTING TO VACATE THE DEDICATION BY CONVEYING THE LAND TO THE APPELLEE, A PURCHASER WITH ACTUAL AND CONSTRUCTIVE NOTICE.

It is respectfully submitted that the District Court's decision that lot 43, square 5869 was not subject to an equitable servitude for off street parking in favor of the Appellant and other residents of Dexter Heights subdivision was erroneous. The rights of purchasers of subdivision lots to use streets, alleys, parks, and other areas of common public use shown on subdivision site plans are created by the law of statutory and common law dedication and the analogous principle of equitable servitude. Menstell v. Johnson, 125 Ore. 180, 262 P. 853, 57, A.L.R. 311 (1927); City of Florence v. Florence Land & Lumber Company, 204 Ala. 775, 85 So. 516 (1920); Street v. Portland, 23 Or. 176, 31 P. 479 (1892) Dykes v. City of Houston, 406 S.W. 2d 176 (Tex. 1966); City of Chicago v. Ward, 169 Ill. 392, 48 N.E. 927 (1897); Archer v. Salinas City, 93 Cal. 43, 28 P. 829 (1892) the cardinal principle of dedication, common law or statutory, and equitable servitude is that purchasers of subdivision lots acquire as a right appurtenant to their lots, every easement, privlege and advantage that the plattor or subdividor represents to be part of the subdivision on the site plan. Menstell v. Johnson, supra.

Statutory dedication operates by way of grant and its efficacy is dependent upon compliance with the applicable statute. Common law dedication and equitable estoppel, i.e. the subdividor is estopped from denying the existence of the streets, alleys, and places of common use which he represents to be part of the subdivision on the subdivision site plan becomes irrevocable when the plattor sells lots with reference to the site plan, and he is thereafter estopped from attempting to vacate the land dedicated by sold or otherwise. West Michigan Park Assn. v. Department of Conservation, 2 Mich. App. 254, 139 N.W. 2d 758 (1966); City of Florence v. Florence Land & Lumber Co. 204 Ala. 775, 85 So. 516 (1920); Byam v. Kansas City Public Service Co., 328 Mo. 813, 41 S.W. 2d 947 (1931); Archer v. Salinas City, 93 Cal. 43, 28 P. 839 (1892); Cole v. Minnesota Loan & Trust Co., 17 N.D. 409, 117 N.W. 354 (1908)

The central issue presented inthis case is whether lot 43, square 5869 was dedicated by the Dexter Realty Company for off street parking for residents of Dexter Heights. There seems to be no real controversy over what use Dexter Realty Company intended to make of lot 43. Robert G. Weightman, a witness called by the Appellee, who was the treasurer of Dexter Realty Company, testified that Dexter Realty Company intended to use lot 43, square 5869 for off street parking for the residents of Dexter Heights in order to comply with Federal Housing Regulations. Mr. Ernest W. Syme, an architect, who drew the site plans for the Dexter Heights subdivision, testified that lot 43, square 5869 was shown on the site plans for use as off street parking for the residents of Dexter Heights. The site plan, attached to the Declaration creating the subdivi-

sion, was a copy of the site plan drawn by Mr. Syme. Another architect, Mr. Warren Gray, testified that he had examined the site plan in question and in his opinion the site plan showed that lot 43, square 5869 was to be used as off street parking for the residents of Dexter Heights.

Despite the overwhelming evidence to the contrary, the District Court ruled as a matter of law that the site plan was insufficient to show that lot 43, square 5869 had been dedicated by the Dexter Realty Company for off street parking. The District Court appeared to be of the view that land could be dedicated for public use only by words of covenant, and finding no words of covenant, the Court ruled that the words written on lot 43, square 5869 in the site plan, "To be graded and cinder covered for car parking (50 cars), provide proper driveway entrance from Talbert Terrace," were purely descriptive and was not intended to create an easement or other property right." (Tr. 100,117) It is respectfully submitted that the District Court's decision has no foundation in law.

The legal sufficiency of particular words on a subdivision site plan to create a dedication has been a well litigated subject. Courts passing on the question have held unanimously that covenants are not needed to create a dedication. A dedication will

be created when the builder-plattor uses words of well understood meaning to indicate places of common use on a subdivision site plan, and land in the subdivision is then sold with reference to the site plan.[1/] If there was any ambiguity in the words used on the site plan,"To be graded and cinder covered for car parking (50 cars), provide proper driveway entrance from Talbert Terrace," and Appellant suggests there was none, the ambiguity was resolved by the testimony of the two architects, one of whom drew the site plan. The words used in the site plan in this particular context were architectual designations of well understood meanings. Moreover, the established rule for interpreting words on subdivision site plans indicating public use is to resolve doubts against the

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1/ The following designations indicating places of common use in subdivision site plans have been held sufficient to create a dedication or equitable servitude. Menstell v. Johnson, 125 Ore. 180, 262 P. 853, mod. 266 P. 891 (1927) blue lines indicating building restrictions; Street v. Portland 23 Or. 176, 31 P. 479 (1892) "parks"; Nixon v. City of Anniston, 219 Ala. 219, 121 F. 2d 458 (5th Cir. 1959) cert. den. 361 U.S. 962 (1959) "Reserved for Ocean Boulevard & Boardwalk"; City of Florence v. Florence Land & Lumber Co., 204 Ala. 775 85 So. 516 (1920) "Monumental Park"; Simpson v. Mikelson, 196 Ill. 575, 63 N.E. 1036 (1902) "Building line fifty feet north from boulevard line"; West Michigan Park Ass'n v. Dept of Conservation, 2 Mich. App 254, 139 N.W. 2d 758 (1966) "parks"; Dykes of Houston v. City of Houston, 406 S.W. 2d 196 (Tex. 1966) "street"; City of Chicago v. Ward, 169 Ill. 392, 48 N.E. 927 (1897) "Open ground, no buildings"; Byam v. Kansas City Public Service Co., 328 Mo. 813 41 S.W. 2d 947 (1931) "Right of way K.C.RYC Co.." ; Briers v. Alderson, 101 W. VA. 662. 133 S.E. 373 (1926) "public grounds, parks"; Dummer v. Jersey City, 20 N.J.L 86 (1843) "reserved for public purposes, with held from sale"; Daughters v. Bd. of Riley County Com'rs, 81 Kan. 548, 106 P. 297 (1910) "market square, school house square, square,'; Archer v. Salinas City, 93 Cal. 43, 28 P. 839 (1892) "park"; Brown v. Manning, 6 Ohio 298 (1843) "lying next to public square, P. square"; MORROW v. Highland Traction Co,, 219 Pa. 619, 69 A. 41 (1908 "Alliquippa Grove"; Ramstad v. Carr, 31 N.D. 504, 154 N.W. 195 (1915) "Lincoln Park"; Cole v. Minnesota Loan & Trust Co., 17 N.D. 409, 117 N.W. 354 (1908) " vacant lot marked'2'"

plattor, and to imply that the plattor intended to dedicate all lands that are marked on the site plan with words that ordinarily indicate a public use. Briers v. Alderson, 101 W. Va. 662 133 S. E. 373 (1926) It is suggested that it was no more necessary to have a covenant describing the persons who were to park on lot 43, square 5869 than it would be to have a covenant describing the persons who were to use the streets marked "Talbert Terrace" and "Dexter Terrace." In both cases, the use for which the land was intended and the persons who were to use it were well understood.

A careful examination of the cases involving the sufficiency of particular words to create easement rights in abutting landowners indicated that some courts will require express covenants for building restrictions. Kime v. Duntz, 249 Mich. 588, 229 N. W. 477 (1930); Zinn v. Sidler, 268 Mo. 680, 187 S. W. 1172 (1916); Mc Closkey v. Kirk, 243 Pa. 319, 90 A. 73 (1914); Contra, Menstell v. Johnson, 125 Or. 180, 262 P. 853, mod. 266 P. 871, 57 ALR 311 (1927); Simpson v. Mikelkelson, 196 Ill. 575 63 N. E. 10 (1902)

The court in Zinn v. Sidler, supra, indicated that while it would require covenants for building restrictions, no covenant would be required to create a dedication of an essential part of a subdivision. However, no case has required an expresss covenant to support a dedication of streets, alleys, parks, and other places of common public use. Building restrictions are restrictions on the rights of each purchaser of land in the subdivision. While land dedicated for streets, alleys, parks, and parking are necessary parts of a subdivision which are for the benefit of landowners in the

subdivision. No subdivision can exist without the latter dedications.

It is submitted that even as early as 1942, an area for off street parking was an essential part of a subdivision where the subdivision consist entirely of adjoining row houses without individual driveways. A lack of adequate off street parking facilities in such a subdivision would result in traffic hazards and congestion. This,in fact, happened in Dexter Heights. That the necessity for off street parking was recognized in 1942, is evidenced by the applicable zoning regulations of the time.

While it is clear that the site plan filed with the Declaration was sufficient to create a common law dedication of lot 43 for off street parking for the subdivision, a subsidiary issue raised in this case is whether the evidence was sufficient to show that Dexter Heights Realty Company intended to create such a dedication. Intent in this context is not used to mean its secret, subjective intent, but its intent as manifested by its objective acts. Byam v. Kansas City Public Service Co., 328 Mo. 813, 41 S. W. 2d 947 (1931); Archer v. Salinas City, 93 Cal. 43, 28 P. 839 (1892) Appellee's theory of the case appears to be that Dexter Realty Company only intended to represent on the site plan that lot 43 would be dedicated for subdivision parking in order to mislead Federal officials into thinking that requirements for off street parking would be met. (Argument of Defense Counsel, Tr. 110, Testimony of Robert G. Weightman, Tr. 90. 91, 95) Under this theory, Dexter Realty Company never had a real intent to grade lot 43 for parking as it was required to do, and as it represented to would do. Moreover, the Appellee contends that if

Dexter Realty Company ever had the intent to grade lot 43 for parking, it abandoned this intent before the houses in the subdivision were sold. In order to support this last contention, the Appellee offered the testimony of Robert G. Weightman who testified that he made no representations concerning the use of lot 43 for parking during the sale of the houses.

The Appellee's position on the intent of Dexter Realty Company has no legal merit. The real question is what was the legal effect of the Compnay's objective acts, irrespective of its secret, subjective intent. The Company represented on a site plan that lot 43 would be used for subdivision parking. The site plan was then attached to and incorporated by reference in a Declaration and filed with the Recorder of Deeds. The latter act is highly significant since the Declaration contained agreements that binded all purchasers of lots, and every purchaser was deemed to have at least record knowledge of its contents. The site plan representing subdivision parking on lot 43 became part of the chain of title of every purchaser of lots in the subdivision. Dexter Realty Company sold lots in the subdivision with the above site plan as part of the chain of title of every purchaser. To say that lots were sold with reference to the site plan under these circumstance is pure nonsense.

It appears beyond agrument that all the lots in the subdivision were sold with reference to a site plan showing lot 43, dedicated for subdivision parking. A common law dedication of all streets and places of common use, indicated on the site plan, became complete when lots were sold with the site plan as part of their

chain of title. (Authorities cited in Footnote I) Dexter Realty Company became thereafter estopped from denying the dedication by sale or otherwise. The residents of the subdivision acquired rights of equitable servitude or easement in all lands which were indicated on the site plan for public use, including lot 43. It should be emphasized that the sale of lots with a subdivision site plan as part of the chain of title creates a common law dedication of all land indicated for public use on the site plan. The municipal authority or other applicable government unit acquires rights in such a dedication upon its formal or implied acceptances. However, the purchasers of subdivision lots acquire rights of easement or equitable servitude in lands indicated on the site plan for public use irrespective of acceptance by the applicable governmental unit. Dykes v. City of Houston, 406 S. W. 2d 176 (1966); Cole v. Minnesota Loan & Trust Company, 17 N. D. 409, 117 N. W. 354 (1908)

It is submitted that the confusion arose in this case because the District Court misapplied the essential principle of dedication that the sale of lots with a subdivision site plan as part of the chain of title creates a common law dedication of all lands indicated for public use on the site plan (Emphasis added). The following example will show that this principle was misapplied by the District Court. The builder designated on the site plan areas marked "streets." The site plan is incorporated by reference in a Declaration containing covenants binding all prospective lot purchasers and filed among the records. Lots are then sold in the subdivision. The builder, however, only marked the areas "streets" on the site plan in order to mislead

municipal officials, and he has no real intent to place streets in the places indicated. Accordingly, he fails to make a statutory dedication. There would be unanimity of opinion that a common law dedication resulted of all the areas marked "streets." No court would hold that the words "streets" were "purely descriptive and was not intended to create an easement or other property right" as the District Court held in this case. A common law dedication would result in the above example because of the sale of the lots in the subdivision with a site plan as part of its chain of title would create a dedication of all lands indicated for public use on the site plan. The same legal principles and objective acts that created a common law dedication of an area marked on a subdivision site plan, "To be graded and cinder covered for car parking (50 cars), provide proper driveway entrance from Talbert Terrace."

It is apparent from the foregoing analysis that the deed from the Dexter Realty Company's successor in interest, the Colonial Mortgage Company, to the Appellee, Morrisette, was a nullity in so far as it purposed to pass a fee simple title to the latter. The Appellee was a purchaser with both actual and constructive notice of the dedication of lot 43 as his grantor had. The dedication of all lands indicated for public use on the site plan, including subdivision parking on lot 43. had become irrevocable long before the Appellee acquired color of title to lot 43. The dedication of places of common use shown on the site plan became irrevocable when Dexter Realty Company sold lots with reference to the site plan in their chain of title. Each purchaser of lots in Dexter Heights acquired as a right appurtenant to his lot, every easement, privilege, and ad-

vantage that Dexter Realty Company represented to be part of the subdivision on the site plan. Dexter Realty Company and its successor in interest, Colonial Mortgage Company, was thereafter estopped from denying the dedication by sale or otherwise. And, of course, the Appellee, a grantee with actual and constructive notice, could acquire no better title than its grantor had.

The District Court placed great weight on the fact that lot 43 was never used for parking. Emphasis on the latter fact is misplaced for it fails to take into consideration the additional fact that the lot was not used for parking because Dexter Realty Company failed to grade it. The lot was impossible to use for parking without proper grading. Moreover, lands indicated for public use need not be used immediately. The land may be used when the need arises. Archer v. Salinas City, 93 Cal. 43, 2 P. 839 (1892)

CONCLUSION

In conclusion, this Court should, in view of the foregoing, reverse the judgment below and cause judgment to be entered for the Appellant.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,810

HORACE CASE, *Appellant*,

v.

ARTHUR E. MORRISSETTE, *Appellee*.

On Appeal from the United States District Court for the District of Columbia

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* Cases chiefly relied upon are marked with asterisks.

STATEMENT OF QUESTIONS PRESENTED

The questions presented by this appeal are:

Whether the court below erred in dismissing the Complaint of appellant, Horace Case?

Whether, the language, to wit: "To be graded and cinder covered for car parking (50 cars) provided proper driveway from Talbert Terrace," appearing within the lot lines of Lot No. 43, Square 5869, on a plat attached to a declaration dated August 18, 1942, recorded in the land records of the District of Columbia in Liber 7783 at Folio 447, created a parking easement in favor of appellant, and

Whether the owner of said Lot 43 is required to maintain said lot for the use and benefit of others?

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,810

HORACE CASE, *Appellant,*

v.

ARTHUR E. MORRISSETTE, *Appellee.*

On Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

I. STATEMENT OF THE CASE

Appellant is fee owner of real property known as Lot 1066, Square 5869, also known as 1349 Talbert Terrace, S. E., Washington, D. C. The property is more particularly described in a deed dated June 28, 1949, recorded in the Office of the Recorder of Deeds, D. C., in Liber 9005, Folio 196. (JA-Ex. A4)

Appellee is the fee owner of a lot known as Lot 43, Square 5869. The said property being more particularly

described in a deed dated July 26, 1963, recorded in the Office of the Recorder of Deeds, D. C., in Liber 12093 at Folio 237. (JA-Ex. A3)

Both of the foregoing lots are a portion of a subdivision known as "Dexter Heights."

The only issue raised by Appellant in his complaint is that the covenant or declaration dated August 17, 1942, recorded in Liber 7783, Folio 447, in the land records of the District of Columbia, grants to Appellant and others the right to park on Lot 43, Square 5869, and that Appellee is obligated to maintain said lot, pay the taxes, and provide free parking to home owners in the Dexter Heights Subdivision. (JA-Ex. A1)

On August 14, 1941 an agreement was recorded in the land records of the District of Columbia in Liber 4652 at Folio 514 (JA-Ex. A6) which said agreement is referred to in the description of Lot 42, Square 5869, in the declaration. (JA-Ex. A1)

On October 7, 1942 a declaration was recorded in the land records of the District of Columbia in Liber 7799 at Folio 262 (JA-Ex. A7) which amends the setback restriction contained in the declaration (JA-Ex. A1). This declaration includes and affects said Lot 43.

Appellant's complaint prayed for a declaratory judgment on the basis that the said declaration (JA-Ex. A1) created a permanent easement, in favor of Appellant, for car parking on said Lot 43 owned in fee by Appellee. Appellant further prayed that Appellee be compelled by a mandatory injunction to grade and cinder cover the lot, and provide a driveway to Talbert Terrace for the free use of Appellant and others.

The Court after hearing the evidence dismissed the case.

II. SUMMARY OF ARGUMENT

A. Appellee contends that the declaration (JA-Ex. A1) does not grant to Appellant or any other lot owners in the subdivision known as Dexter Heights any legal or equitable rights to the use of Lot 43, Square 5869, for car parking.

B. Appellee contends that the aforesaid declaration does not require Appellee to grade and cinder cover Lot 43, provide a driveway to Talbert Terrace, N. E., or to perpetually maintain said Lot 43 for car parking for Appellant or other lot owners in Dexter Heights.

III. ARGUMENT

The only issue before this Court is to determine what rights and restrictions, if any, are imposed upon Appellee, the owner of Lot 43, Square 5869, by the declaration recorded August 18, 1942. (JA-Ex. A1)

Each lot subject to the recorded declaration is fully described therein. Each lot was granted a perpetual right of way over the private roads called "Dexter Terrace" and "Dexter Place." Each lot was also subject to the agreement dated August 14, 1941 recorded in Liber 7652 at Folio 514 of the land records of the District of Columbia. (JA-Ex. A6) This agreement does not grant to any of the lot owners any right of way or easements. It is an agreement required by the District of Columbia where more than one living unit is served by one sewer or water connection.

The declaration describes Lot 43, Square 5869, as follows:

> "Lot forty-three (43) in Square 5869 in the subdivision made by Dexter Realty Company, Inc., known as 'Dexter Heights', as per plat recorded in the Office of the Surveyor for the District for the District of Columbia in Liber 119 at Folio 7 on the plat attached hereto and made a part hereof. Subject to the build-

> ing restriction line as shown on said plat and together with a perpetual right of way over the private roads called 'Dexter Terrace' and 'Dexter Place' as shown on said last mentioned plat for the use and benefit of the lots in said Subdivision and subject to the agreement by and between the Dexter Realty Company, Inc., dated August 14, 1941 and recorded in Liber 7652 at Folio 514 of the Land Records of the District of Columbia."

The foregoing description does not impose upon or burden said Lot 43 with any easements or equitable rights of other lots described therein.

The declaration incorporated a plat for the purpose of describing and identifying the lot subject to the restrictive covenants set out as (A) through (G) and for no other purpose whatsoever.

Appellant's deed (JA-Ex. A4) describes his property as follows:

> "All that piece or parcel of land, together with the improvements, rights, privileges and appurtenances to the same belonging, situate in the District of Columbia, described as follows, to wit: Part of Lot numbered Forty-four (44) in Square numbered Fifty-eight Hundred Sixty-nine (5869) in the subdivision known as 'Dexter Heights' made by Dexter Realty Co., Inc., as per plat recorded in Liber 119 at folio 7 in the Office of the Surveyor for the District of Columbia.
>
> "Said part of Lot numbered Forty-four (44) comprising the lot designated as Forty-four-0 (44-0) on the plats attached to and made a part of the declaration recorded in Liber 7783 at folios 447 to 451 and Liber 7847 at folios 55, 56, and 57, among the Land Records of the District of Columbia; with improvements thereon known as 1349 Talbert Terrace, S. E."

Appellant's deed conveyed to him the right to use Dexter Place and Dexter Terrace but did not convey to Appellant any right, title or interest in Lot 43, Square 5869. It simply describes his lot as being designated as Lot 44-0 on the plat attached to the aforesaid declaration.

Appellee's deed (JA-Ex. A3) described Lot 43, Square 5869, as the area for car parking as shown on said plat attached to said declaration. The words used are descriptive of the land conveyed and do not subject said land to any easements or restriction other than those set out in the declaration as (A) through (G).

The sole intent of the declaration (JA-Ex. A1) is clearly set forth under paragraph (A) which reads as follows: "All lots in the tract shall be known and described as residential lots . . . ."

The aforesaid declaration was amended by a declaration recorded in the land records of the District of Columbia on October 7, 1942, in Liber 7799, at Folio 262. (JA-Ex. A7). Lot 43, Square 5869, was included in the amendment. The amendment was intended to clarify the setback restrictions and does not create any covenant or burden on Lot 43 for car parking.

The zoning regulation (JA-Ex. A5) cited by Appellant in support of his position has no bearing on this case whatsoever. The zoning regulation was made effective September 8, 1942 and there is no evidence that this project was subject thereto. Building permits issued prior to September 8, 1942 would not be subject to the amended zoning regulation.

The project was originally constructed as a rental housing project, and Dexter Realty Company, Inc., owned and operated the project as a rental housing project during and after World War II.

In order to sell the lots and improvements, it was necessary to make certain structural changes so that they would

meet local code requirements. (T.R. pp. 93, 94) The Dexter Realty Company, Inc., sold the respective houses and lots to private owners and did not convey any title or interest in Lot 43 to the respective purchaser. They retained the fee title which was thereafter sold to Appellee. None of the purchasers including Appellant have ever parked cars on the subject lot. It has never been graded, never been cinder covered and never had any access to Talbert Terrace. Therefore, the doctrine of equitable servitude is completely inapplicable.

Appellant set forth in his statement of facts that Mr. Ernest W. Syme prepared the original site plan attached to Plaintiff's No. 1. Mr. Syme testified on cross examination (T.R. pp. 50-51) that he did not make the original site plan, that his site plan was copied from the original, and he did not know who wrote the language appearing on Lot 43.

In support of his argument, Appellant cites the case of *Menstell* v. *Johnson,* 125 Ore. 180, 262 P. 853, 57 A.L.R. 311 (1927). This case involved the violation of a building setback line shown on a recorded subdivision plat.

The plat also dedicated certain streets and parks to the City for public use. The Court, "we conclude that the filing of the plat, followed by the act of the public authorities in taking charge of the Avenues, Streets, alleys and park areas constituted an acceptance by the City of all the public places and easements for light, air vision and similar conveniences created by the building lines; further, that their easement has not been abandoned or vacated."

That case is not applicable to this case. The avenues, streets, alleys and park area were dedicated to the City and accepted by the City. In the subject case Lot 43 was not dedicated to the public, or the City, and was never accepted by the City, or public authority, for operation and maintenance as a public parking lot.

Appellant cited the case of *Zinn* v. *Sidler,* 268 Mo. 680, 187 S.W. 1172, in support of his argument. In this case the dedicator drew upon the plat a line 20 feet and parallel to the street line, this he designated with the words "building lines," no reference to the line appeared anywhere else. The Court said: "So far as our investigation has led us a mere designated line drawn upon a plat will not suffice to create a covenant."

This case supports the position of Appellee rather than that of Appellant in that the descriptive language inserted within the lot lines of Lot 43 does not suffice to create a dedication or a covenant. The plat is an exhibit to a declaration in which Lot 43 is described as a residential lot. Nowhere in the body of the declaration (JA-Ex. A1), the subject of the appeal, is Lot 43, Square 5869, described as a public parking area.

Appellant puts great weight on the case of *West Michigan Park Association* v. *Department of Conservation,* 2 Mich. App. 254, 139 N.W. 2d 758 (1966). This case involved certain parkland that was dedicated and accepted by the County.

The Court found as follows: "The public for many years, used the beach and park areas, especially the beach areas . . . . The Court found a statutory dedication present. The record also contained a finding that public moneys were spent to maintain walks and fire lanes in the plat.

"By statute governing town plats provided that when made, acknowledged and recorded in accordance with the statute, they shall be deemed a sufficient conveyance to vest a fee of such parcels, for public use in the County."

In the case at bar there was no dedication or acceptance by the public, or the City, and the lot has never been graded, cinder covered or used by anyone as a public, or private parking lot. In the said case the Court found that

the land in question had been accepted by the public for many years. By side note the Court stated, "This Court does not substitute its judgment on questions of fact in a nonjury case unless the evidence presented clearly preponderates in the opposite direction."

Appellant cites the case of the *City of Florence* v. *Florence Land and Lumber Company*, 204 Ala. 775, 85 So. 516 (1920), in support of his case. In this case the Court held as follows: "The burden to establish a dedication to public use is on the party asserting it and to establish a dedication the 'clearest intention' on the part of the owner to effect a dedication 'must be shown.'

"When lots are sold with reference to plats or maps whereon highways, parks or commons are definitely indicated or designated as being assigned to public use .

"The fact and evidence showed a deliberate intent unconditionally to dedicate the area to the public use."

In the referenced case, the evidence and the plat showed a deliberate intent to dedicate certain highways and parks for public use. In the subject case the evidence and the declaration (JA-Ex. A1) does not show any intent to dedicate Lot 43, Square 5869, for public use. On the contrary said declaration clearly shows Lot 43 as a residential lot. Had it been the intent of the plattor to dedicate Lot 43 for public use it would have been set out in the instrument itself and not by a plat attached. The language on the plat are not words of dedication, but as the Court below held, the language used were words of description.

Appellant cites the case of *Briers* v. *Alderson*, 101 W.Va. 662, 133 S.E. 373 (1926), in support of his case. In this case the Court held as follows: "Dedication by agents of property of a corporation to public use must be authorized by the board of directors to bind corporation. Evidence was sufficient to show that the grantor intended the strip of land to be dedicated for public use."

In the referenced case, it was shown that it was the grantor's intent to dedicate the strip of land in question for public use. In the subject case no such intent was shown or contemplated by the declaration (JA-Ex. A1).

Appellant cites the case of *Dykes* v. *City of Houston*, 406 S.W. 2d 176, (Tex. 1966), in support of his case.

> "The filed plat, page 179 showed Buckingham Drive to be a street and not as a building lot. The Court held in substance that the street was a dedicated street and subsequent abutting lot owners had an easement over the street."

The referenced case like all the others relied on by Appellant showed a clear intent to dedicate a street for public use. In the case at bar the declaration (JA-Ex. A1) clearly sets out in the body of the instrument that all the lots had a perpetual right of way over the private roads called "Dexter Terrace" and "Dexter Place," but it did not grant any easement to use lot 43, Square 5869, for public parking. The declaration describes said lot as a residential lot.

In the case of *Jameson* v. *Brown*, 71 App. D.C., 109 F. 2d 830, the Court held equity will not as a rule enforce a restriction where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where complainant has waived or abandoned the restriction.

Lot 43, Square 5869, has never been used by Appellant or any other lot owner for car parking. The declaration (JA-Ex. A1) makes no provision for its dedication for public use or ownership. It does not provide for its perpetual maintenance as a parking lot. Appellee and the prior owner have paid the real estate taxes since August 1942. Appellant is now estopped in equity to claim any right to the use of the lot.

In support of Appellee's case and the findings of the Court below, reference is made to the case of *Hale* v.

Finch, 104 U.S. 261, 26 L. Ed. 732, in which our Supreme Court held as follows:

> "A covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the party or person to be charged for the performance or non-performance of some act."

Reference is also made to the case of *Oscar L. Chapman* v. *Sheridan-Wyoming Coal Company, Inc.,* 338 U.S. 621, 70 S. Ct. 392, 49 L. Ed. 393, in which our Supreme Court held as follows:

> "Courts would not lightly imply against any land owner a covenant which would restrict alienation or enjoyment of his estate."

The intent, as is clearly set forth in the declaration (JA-Ex. A1) the instrument relied on by Appellant in his appeal, was solely for the purpose of creating certain restrictive covenants such as restricting all lots to residential use only, it describes the type of dwelling to be erected, it establishes setback requirements and it imposes other usual restrictions as therein set forth. Lot 43, Square 5869, is subject to all the restrictions as set forth in the written declaration and no others. In support of this contention, reference is made to the case of *Maher* v. *Park Homes, Inc.,* 258 Iowa 1291, 142 N.W. 2d 430 in which case the Court held as follows:

> "Precedents are too numerous to cite individually hold restrictions on the free use of property are strictly construed against the party seeking to enforce them, will not be extended by implication or construction beyond the clear meaning of their terms and doubts will be resolved in favor of the unrestricted use of property, 26 C.J.S. Deeds Sec. 163A; 20 Am. Jur. 2d Covenants, conditions, etc. Section 187, See also Jones v. Beiber, Supra, 251 Iowa 969, 971, 972, 103 N.W. 2d 364, 365, Anno. 30.A L.R. 2d 599, 560."

In support of the doctrine that the written portion of a document prevails over the printed portion is well established in the case of *Stanley* v. *Greenfield,* 61 S.E. 2d 818, 207 Ga. 390. The Court held as follows:

> "A recorded deed referred to a plat of record which plat showed a building line 60 feet from the street, but the deed set out, among other restrictions that no residence shall be erected 10 feet from any side line or nearer than 80 feet from the property line as shown by plat. By analogy and parity of reasoning, a mere general reference in a deed to a plat which may logically serve as an identification of the property by lot and block numbers must yield to specific provisions written in a deed in words and figures dealing particularly with the subject of building line restrictions, although the plat shows a dotted building line across lots in the subdivision in a number of feet different from that expressed in the deed."

In the construction of contracts there is a rule that a written portion prevails over a printed portion, where the two cannot be reconciled. *Shackelford* v. *Fitzgerald,* 151 Ga. 485, 105 S.E. 597.

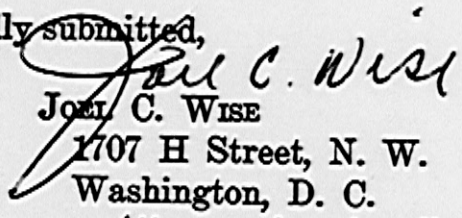
The rule regarding strict construction of covenants restricting the free use of land is set forth in 20 Am. Jur. 2d Sec. 187. The referenced section reads as follows:

> "Covenants and agreements restricting the free use of property are strictly construed against limitation upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to effect lands not specifically described, or grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubts will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of land."

IV. CONCLUSION

The Court below was not in error in dismissing Appellant's claim and the decision must be sustained.

Respectfully submitted,



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